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CONN'S, INC. and CONN APPLIANCES, INC.

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

FRANCINE EDWARDS, individually
and on behalf of all and others similarly
situated,

Plaintiff,

v.

CONN'S, INC. and CONN
APPLIANCES, INC.,

Defendants.

Case No. 2:18-cv-01998-APG-BNW

**DEFENDANTS' MOTION TO
STAY PROCEEDINGS PENDING
SUPREME COURT'S DECISION
IN *BARR v. AM. ASS'N OF
POLITICAL CONSULTANTS, INC.*,
CASE NO. 19-631**

Defendants Conn's, Inc. and Conn Appliances, Inc. (together, "Conn's") request that this Court stay all proceedings in this case, and would respectfully show as follows:

I. Introduction

Plaintiff's suit in this case alleges violations of the Telephone Consumer Protection Act (the "TCPA"), 47 U.S.C. §§ 227 *et seq.* On January 10, 2020, the Supreme Court granted certiorari in *Barr v. American Association of Political Consultants, Inc.*, No. 19-631, 2020 U.S. LEXIS 2 (2020), to address the very constitutionality of the TCPA. The issue presented is whether the TCPA is an unconstitutional, content-based restriction on free speech, and whether the proper remedy for a constitutional violation is to sever any content-based exemptions from the rest of the statute.¹ The Supreme Court's decision in *Barr v. AAPC* will likely be handed down no later than June 2020²—less than five months from the date of this motion.

Depending on the Supreme Court's decision, there may not even be a TCPA for Plaintiff to sue under. The parties should not be required to litigate this case under such a cloud of uncertainty. Conn's instead asks the Court to stay this case, to promote judicial economy and fairness to the parties, until the Supreme Court's ruling is available to clarify whether the TCPA is an unconstitutional restriction on free speech.

II. Background

Plaintiff's causes of action in this case allege violations of the TCPA's automated calling provisions, 47 U.S.C. § 227(b)(1)(A). The TCPA prohibits, *inter*

¹ <https://www.supremecourt.gov/docket/docketfiles/html/qp/19-00631qp.pdf> (last visited Jan. 31, 2020).

² https://www.supremecourt.gov/casehand/Guide%20for%20Counsel%202019_rev10_3_19.pdf at 14 ("[C]ases argued during the Term are usually decided before the end of June.") (last visited Jan. 31, 2020).

1 *alia*, calls made using an “automatic telephone dialing system”³ “or an artificial or
2 prerecorded voice” to call a cellular telephone service without “the prior express
3 consent of the called party.” 47 U.S.C. § 227(b)(1)(A).

4 At issue in *Barr v. AAPC* is an exemption to the automated call prohibition.
5 The TCPA exempts otherwise-prohibited calls if they are “made solely to collect a
6 debt owed to or guaranteed by the United States.” *Id.* § 227(b)(1)(A)(iii).⁴ The
7 AAPC’s suit challenged the government-backed debt exemption as creating an
8 impermissible content-based restriction on speech—speech to collect government-
9 backed debt was favored, and speech involving other content was disfavored. The
10 Fourth Circuit agreed with AAPC: “the debt-collection exemption fails to satisfy
11 strict scrutiny, constitutes an unconstitutional content-based restriction on speech,
12 and therefore violates the Free Speech Clause.” *Am Ass’n of Political Consultants,*
13 *Inc. v. FCC*, 923 F.3d 159, 170 (4th Cir. 2019).

14 When a statutory exception violates the First Amendment, the correct remedy
15 is to strike down the entire statute as unconstitutional. *See, e.g., Rappa v. New Castle*
16 *Cnty.*, 18 F.3d 1043, 1073 (3d Cir. 1994) (explaining that courts will not sever a
17 statutory exception if “[e]liminating the offending exception would mean that we
18 would be requiring the State to restrict *more* speech than it currently does”); *see also*
19 *Police Dep’t of Chicago v. Mosley*, 408 U.S. 92, 102 (1972) (invalidating entire
20 ordinance prohibiting picketing outside schools, not severing exception for labor
21 picketing). However, the Fourth Circuit did not follow this clear precedent and
22

23 ³ An “automatic telephone dialing system” or “ATDS” is defined as equipment
24 having the capacity: “(A) to store or produce telephone numbers to be called, using
25 a random or sequential number generator; and (B) to dial such numbers.” 47 U.S.C.
26 § 227(a)(1).

27 ⁴ There are other content-based exemptions to the TCPA that are not at issue in *Barr*
28 *v. AAPC*. *See* 47 U.S.C. § 227(b)(1)(A)(iii) (emergency calls); *In the Matter of Rules*
and Regs. Implementing the Tel. Consumer Protection Act of 1991, 30 FCC Rcd.
7961, 8030 ¶ 146 (July 10, 2015) (calls related to medical appointment reminders).

1 instead chose to restrict *more* speech by severing the government-backed debt
2 exemption. *See* 923 F.3d at 171.

3 The Supreme Court granted certiorari. The constitutionality of not only the
4 government-backed debt exemption, but the entire TCPA, will be decided in only a
5 few months.

6 III. Argument

7 The Court should stay this case while the Supreme Court decides the
8 constitutionality of the TCPA. “[T]he power to stay proceedings is incidental to the
9 power inherent in every court to control the disposition of the causes on its docket
10 with economy of time and effort for itself, for counsel, and for litigants. How this can
11 best be done calls for the exercise of judgment, which must weigh competing interests
12 and maintain an even balance.” *Landis v. N. Am. Co.*, 299 U.S. 248, 254–55 (1936).

13 A trial court may, with propriety, find it is efficient for its
14 own docket and the fairest course for the parties to enter a
15 stay of an action before it, pending resolution of
16 independent proceedings which bear upon the case.

17 *Levy v. Certified Grocers of Cal., Ltd.*, 593 F.2d 857, 863 (9th Cir. 1979). “[T]he
18 decision to grant a stay . . . is generally left to the sound discretion of district courts.”
19 *Ryan v. Gonzales*, 568 U.S. 57, 74 (2013) (internal quotation marks omitted).

20 The Ninth Circuit instructs district courts to weigh three factors when
21 considering a motion to stay: (1) the extent to which issues of law and fact will be
22 simplified if a stay is granted; (2) the hardship or inequity the requesting party will
23 suffer absent a stay; and (3) the possible harm that will result from granting a stay.
24 *See CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962). These factors weigh
25 uniformly in favor of a stay.

26 **Simplification of Issues of Law and Fact.** The Supreme Court will be
27 deciding the constitutionality of the statute on which Plaintiff’s causes of actions are
28 based. The Supreme Court’s decision, expected by June 2020, will provide
substantial guidance to this Court and the parties in resolving this dispute. *See Landis*,

1 299 U.S. at 253 (holding that a stay may be warranted where the resolution of other
2 litigation will likely “narrow the issues in the pending cases and assist in the
3 determination of the questions of law involved”). Indeed, the Supreme Court’s
4 decision might eliminate Plaintiff’s cause of action entirely. That would
5 unquestionably simplify issues of law and fact.

6 **Hardship to Conn’s Absent a Stay.** Proceeding in the absence of such
7 guidance would be inefficient, waste the resources of the Court and the parties, and
8 potentially result in an inconsistent ruling that will need to be corrected in light of
9 any decision by the Supreme Court. It would impose a hardship on Conn’s to require
10 it to engage in discovery and motion practice if Plaintiff does not have a valid cause
11 of action. Yet that is the result that would follow absent a stay if the Supreme Court
12 determines the TCPA to be unconstitutional.

13 **Possible Harm from Granting a Stay.** Minimal harm will follow from
14 granting a stay. Indeed, discovery in this case was stayed until very recently, and the
15 current phase of discovery is focused solely on Plaintiff’s individual claims.
16 Moreover, there is no imminent trial date that is threatened by an additional brief stay
17 of this action to allow the Supreme Court to rule.

IV. Conclusion

Good cause exists to stay the proceedings, for reasons of judicial efficiency and fairness to the parties. Conn's therefore respectfully requests that this Court stay this case pending the Supreme Court's decision in *Barr v. AAPC*.

Dated: January 31, 2020

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By: /s/ Jennifer L. Braster

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INC.

CERTIFICATE OF SERVICE

Pursuant to Federal Rule of Civil Procedure 5(b), I hereby certify that I am an employee of NAYLOR & BRASTER and that on this 31st day of January 2020, I caused the document **DEFENDANTS' MOTION TO STAY PROCEEDINGS PENDING SUPREME COURT'S DECISION IN *BARR v. AM. ASS'N OF POLITICAL CONSULTANTS, INC.*, CASE NO. 19-631** to be served through the Court's CM/ECF to all parties appearing in this case.

/s/ Amy Reams
An Employee of NAYLOR & BRASTER

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